85-687

No.

Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

October Term, 1985

NORMAN KELLY
Petitioner

vs.

WHITING, JUDGE, ET AL.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

SANFORD J. BERGER
Counsel of Record
ROBERT M. FERTEL

BERGER AND FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950
Attorneys for Petitioner

BROTHERS PRINTING CO., 2000 EUCLID AVE., CLEVELAND, OHIO—(216) 621-6050

QUESTIONS PRESENTED

1. Does a plaintiff have sufficient standing to raise federal constitutional claims of third parties when he has suffered a similar injury and such third parties are unable to adequately protect their own interests?
2. In a civil contempt proceeding, is an individual denied procedural due process when a warrant for his immediate arrest is issued against him *ex parte* pursuant to a conclusionary affidavit?
3. Are private parties who cause the *ex parte* deprivation of an individual's constitutionally protected liberty interest pursuant to an established state court procedure "state actors" for purposes of the federal civil rights act, 42 U.S.C. §1983?
4. Is a state court judge entitled to judicial immunity when state statutory law mandates that a certain condition precedent be complied with to activate his jurisdiction?
5. Does a state judicial appellate system deprive a party of due process of law and his First Amendment right to access to the courts when it knowingly avoids the resolution of properly presented and accepted issues involving state substantive and federal constitutional rights?

PARTIES

The plaintiff-appellant in the proceeding in the Ohio Supreme Court was Norman Kelly. the defendant-appellees in the Ohio Supreme Court were: Judge Herbert R. Whiting, Judge James D. Sweeney, Referee Ramon Basie, Bureau of Support (Michael O'Grady, Director), Gerald Fuerst, Clerk of Courts, Margo Kelly, Mildred K. Schad, and the law firm of Radman, Schad and Ginsberg Co., L.P.A.

The then Ohio Attorney General, William J. Brown, was named in the complaint because the constitutionality of an Ohio statute was drawn into question, but none of the allegations pertained to the State of Ohio and no relief was sought against the State of Ohio.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding Below i
Table of Authorities iv
Opinions Below 1
Jurisdictional Statement 1
Constitutional Provisions 2
Statement of the Case 2
Reasons for Granting the Writ 4
I. The state court failed to properly determine Petitioner's standing to raise his third party claims 4
II. The *ex parte* issuance of a capias without notice constitutes a denial of due process. 5
III. The private respondents must be considered as state actors inasmuch as they caused the deprivation of a constitutionally protected liberty interest pursuant to an unconstitutional state court custom and usage. 7
IV. The respondent Judge Whiting is not protected by judicial immunity since he only had limited jurisdiction and state statutory law existed that deprived him of jurisdiction. 8
V. The Petitioner is not barred from having his federal claims reviewed by this court.
A. There is no adequate state ground involved which would deprive this Court of jurisdiction. 11
B. The actions of the Ohio Supreme Court denied federal constitutional rights to the Petitioner. 11
C. This Court should not deny review due to the present change by the Respondents in the procedures now used by them in the issuance of capiases. 12
D. The state trial court made factual conclusions without testimony or other evidentiary matter, and any such conclusions cannot be used to deny review by this court. 12

Conclusion 13

Appendix:

Order of the Supreme Court of Ohio A1
Supplemental Opinion of the Chief Justice of The Supreme Court of Ohio A6
Judgment Entry of the Ohio Supreme Court A7
Rehearing Entry of the Ohio Supreme Court A8
Journal Entry and Opinion of the Court of Appeals, Cuyahoga County, Ohio A9
Opinion and Order of the Court of Common Pleas A16
Propositions of Law Presented to the Supreme Court of Ohio A19

Constitution of the United States:

Article III, Section 2 ..... A20
Amendment I A20
Amendment 14, Section 1 ..... A20

INDEX OF AUTHORITIES

CASES

Adickes v. S.H. Kress and Co.,
398 U.S. 144 (1970) 7
Andes v. Ely,
158 U.S. 312 (1894) 10
Baldwin v. Hale,
1 Wall 223 (1864) 5
Barrows v. Jackson,
346 U.S. 249 (1953) 5
Blum v. Yaretsky,
457 U.S. 991 (1982) 07
Board of License Commissioners of the Town of Tiverton v. Pastore,
___ U.S. ___, 103 S. Ct. 2161 (1983) 12
Bill Johnson Restaurants Inc. v. N.L.R.B.,
___ U.S., ___, S. Ct. 2161 (1983) 11
Boddie v. Connecticut,
401 U.S. 371 (1971) 12
California Motor Transportation Co. v. Trucking Unlimited,
404 U.S. 508 (1971) 11
Carey v. Piphus,
435 U.S. 247 (1978) 4
Cleveland Board of Education v. Loudermill,
___ U.S. ___, 105 S. Ct. 1487 (1985) 13
Cuyahoga County Board of Mental Retardation v. Ass'n of Teachers,
47 Ohio App. 2d 28 (1975) 9
Dahlberg v. Becker,
748 F. 2d 85 (C.A. 2, 1984) cert. den'd ___ U.S. ___,
105 S. Ct. 1845 (1985) 7
Evitts v. Lucey,
___ U.S. ___, 105 S. Ct. 830 (1985) 12
Fiske v. Kansas,
274 U.S. 380 (1927) 13
Goldberg v. Kelly,
397 U.S. 254 (1970) 6
Greene v. McElroy,
360 U.S. 474 (1959) 6

Henry v. Mississippi,
379 U.S. 443 (1965) 11
Holt v. Virginia,
381 U.S. 131 (1961) 5
Ingraham v. Wright,
430 U.S. 651 (1977) 4
In Re Dellenbaugh and Burke,
17 Ohio C.C. 106 (1899) 9
In re Green,
369 U.S. 689 (1962) 5
In Re Oliver,
333 U.S. 257 (1948) 5
James v. Kentucky,
___ U.S. ___, 104 S. Ct. 1830 (1984) 11
Logan v. Zimmerman Brush Co., et al.,
455 U.S. 426 (1982) 12
Lugar v. Edmonson Oil Corp., Inc.,
457 U.S. 922 (1982) 6, 7
Mennonite Board of Missions v. Adams,
___, U.S. ___, 103 S. Ct. 2706 (1983) 6
Phillips Petroleum Co. v. Shutts,
___ U.S. ___, 105 S. Ct. 2965 (1985) 4
Poss v. Moreland,
324 S.E. 2d 456 (1985) 7
Quinn v. Muscare,
425 U.S. 560 (1975) 12
Rosenberg v. Gattarello,
49 Ohio App. 2d 87 (1976) 10
Schall v. Martin,
___ U.S. ___, 104 S. Ct. 2403 (1984) 6
Secretary of State of Maryland v. Joseph H. Munson Co., Inc.,
___ U.S. ___, 104 S. Ct. 2839 (1984) 4
Singleton v. Wulff,
428 U.S. 106 (1976) 5
Smith v. Organization of Foster Families for Equality and Reform,
431 U.S. 816 (1977) 4
Specht v. Patterson,
387 U.S. 605 (1967) 6

Spoors v. Coen,
44 Ohio St. 497 (1886) 10
State, ex rel. Bechtel v. McCabe,
60 Ohio App. 233 (1938) 10
State, ex rel. Lesher v. Kainrad,
65 Ohio St. 2d 68 8
Street v. New York,
394 U.S. 576 (1969) 6
Stump v. Sparkman,
435 U.S. 349 (1978) 10
United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 12
Vitek v. Jones,
445 U.S. 480 (1980) 4
Voorhes v. The Bank of the United States,
35 U.S. 449 (1836) 8
Webb v. Webb,
451 U.S. 493 (1981) 6
Youngberg v. Romeo,
457 U.S. 307 (1982) 4
Zakany v. Zakany,
9 Ohio St. 3d 192 (1984) 8

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III, Sec. 2 4
U.S. Constitution, First Amendment 11
U.S. Constitution, Fourteenth Amendment 2, 12

STATUTES

42 U.S. Code §1983 3
Ohio Revised Code § 2301.34 et seq. 8

NO.

Supreme Court of the United States

October Term, 1985

NORMAN KELLY

Petitioner

- vs -

WHITING, JUDGE, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

Norman Kelly petitions for a writ of certiorari to the Supreme Court of Ohio to review the judgment entered by that court against him.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio entered on May 15, 1985, and reported at 17 Ohio St. 3d 91, is contained in the Appendix. The opinion of the Court of Appeals of Cuyahoga County, Ohio entered on July 21, 1983 is unreported and contained in the Appendix. The opinion of the Court of Common Pleas of Cuyahoga County, Ohio entered on July 22, 1982 is unreported and contained in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The judgment of the Ohio Supreme Court denying Petitioners Motion for Rehearing was on June 19, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Sec. 2 of the United States Constitution, and the First and Fourteenth Amendments thereto are involved.

STATEMENT OF THE CASE

On April 20, 1981, the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, issued a post-divorce order requiring the Petitioner to pay an additional amount for child support, certain medical bills of the children, to make arrangements to pay an orthodonthia bill, and gave a judgment for $700 to his ex-wife's attorney. At the bottom of the order, it was stated:

> . . . That in the event it is made to appear to the Court within one year by affidavit or by the report of the Department of Domestic Relations that the above order of the Court is not being complied with, a citation, *wage order, capias,* shall immediately issue for the said *De-*

fendant without further notice, requiring him to appear instanter to show cause why he should not be punished for contempt.

On May 30, 1981, Respondent Margo Kelly executed an affidavit swearing that Petitioners was in violation of the 4/20/81 order. The affidavit was prepared, notarized and filed in the state court on June 3, 1981 by her attorney, the Respondent Mildred Schad. At the time the false affidavit was filed, the Petitioner was in complete compliance with the order and was actually $154.72 ahead in his payments. However, he had not paid the judgment of $700 in attorney fees, and this ruse was an attempt to coerce payment thereof instead of executing upon judgment.

Respondent Referee Basie, based solely upon the affidavit, and without notice to the Petitioner, recommended that a capias be issued for the immediate arrest of the Petitioner. An order for the issuance of a capias was issued, still without notice to the Petitioner, by the Respondent Judge Herbert R. Whiting on June 19, 1981, and delivered to the sheriff for immediate execution. A kindly deputy sheriff advised Petitioner's employer of the capias; Petitioner called his attorney who then obtained a temporary stay of execution of the capias pending a hearing before the court. Petitioner was never arrested, but he was faced with the possibility of imprisonment while the capias hung over his head.

After three scheduled court appearances over a two month period with Petitioner and his attorneys being present, but his ex-wife and her attorney were absent, the charges against Petitioner were voluntarily dismissed when Petitioner privately proved that he was not in violation of the order at the time of the filing of the affidavit seeking arrest.

On May 28, 1982, Petitioner filed his Complaint in the state Court of Common Pleas seeking injunctive, declaratory and monetary relief; claiming that he was denied a federal constitutional liberty interest without due process as guaranteed by the *Fourteenth Amendment* to the United States Constitution. He also filed a Motion for a Preliminary Injunction and certification as a class action-seeking to represent all individuals who have been, or were in imminent danger of, being arrested solely upon the *ex parte* issuance of a capias.

Legal argument regarding the issurance of a preliminary injunction was held in the state trial court on July 16, 1982, but no evidence was presented to the court by Respondents as to the

truthfullness of the affidavit.

On July 22, 1982, the trial court issued an order dismissing the Complaint *in toto*. A16. At A17, the order specifically states that Petitioner's claim for injunctive relief was based upon the *Fourteenth Amendment*.

The state trial judge dismissed all of Petitioner's claims against the judges, referee, and court personnel on the basis of judicial immunity, and held that he lacked sufficient standing since he was never arrested or in imminent danger thereof, and that he did not have "clean hands," although no evidence had been presented on that issue.

The claims against the private defendants, the ex-wife, her attorney and law firm, were dismissed for lack of standing and collateral estoppel.

Petitioner then filed a timely appeal to the Court of Appeals for Cuyahoga County, Ohio wherein he raised his federal constitutional claims. At A9. The Court of Appeals affirmed the judgment of the trial court by holding that the governmental defendants were entitled to judicial or quasi-judicial immunity; that Petitioner lacked standing to raise his claims for injunctive and declaratory relief; that the private defendants were not state actors and immune from liability for a proceeding commenced under 42 U.S.C. §1983.

Petitioner then filed a timely appeal to the Ohio Supreme Court, which accepted the case for review of the issues presented in Petitioner's Memorandum In Support of Jurisdiction. See Petitioner's Propositions of Law at A19 wherein he raised his federal constitutional claims. In affirming the Court of Appeals, the Ohio Supreme Court rendered a synopsidized edition of their opinion, avoided the propositions of law presented, and held that it did not have jurisdiction to determine Petitioner's standing to maintain a class action (Footnote 1 at A5) as he had failed to appeal the denial to proceed as a class action, and his claims for injunctive and declaratory relief concerned the members of the class he sought to represent. However, the state trial court dismissed his Complaint *in toto* without determining the class action aspect. Further, the state trial court and court of appeals specifically held that he lacked standing, and his attorneys raised his standing claims before the state Court of Appeals and the Ohio Supreme Court. The Ohio Supreme Court also held that even if it had jurisdiction to determine his standing claims, it

would hold against him as he was never arrested nor in imminent danger.

On April 24, 1985, Petitioner filed a Motion For Rehearing with the Ohio Supreme Court, which was denied on June 19, 1985. A7.

When Petitioner's Motion For Rehearing complained that there were misstatements of the record and a failure to follow precedent, a mysterious concurring opinion was filed. A6.

1. THE STATE COURT FAILED TO PROPERLY DETERMINE PETITIONER'S STANDING TO RAISE HIS THIRD PARTY CLAIMS.

Since the Petitioner was not arrested or in imminent danger thereof at the time of his Complaint, his claims for injunctive and declaratory relief concerned third parties: the members of the class he sought to represent. Whether or not he had standing to assert the third party claims herein is a federal question which does not depend upon his prior standing in state court. *Phillips Petroleum Co. v. Shutts,* ___ U.S. ___, 105 S. Ct. 2965, 2971 (1985).

This court recently enunciated a two-part inquiry to determine a party's standing to raise federal claims. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.,* ___ U.S. ___, 104 S. Ct. 2839, 2846-2848 (1984).

The *first* inquiry is whether or not the plaintiff satisfies the case or controversy requirement of *Article III* of the United States Constitution by suffering an actual injury as a result of the defendant's putative conduct. In answer, the right to personal security and autonomy is protected by the Due Process Clause. *Youngberg v. Romeo,* 457 U.S. 307, 315 (1982); *Vitek v. Jones,* 445 U.S. 480, 490 (1980), and *Ingrham v. Wright,* 430 U.S. 651, 673 (1977). Further, it is not the weight of the interest involved in determining if it is constitutionally protected, but the nature thereof. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 841 (1977). Also, this Court has held that a party may recover damages in a §1983 action for psychological and emotional injuries caused by a denial of procedural due process. *Carey v. Piphus,* 435 U.S. 247, 264. (1978)

The Petitioner suffered an actual injury, the deprivation of a constitutionally protected liberty interest, when a capias issued for his immediate arrest without prior notice. He was forced to retain an attorney and he had the constant threat of imprisonment

over his head for two months. One of the worst psychological losses is a "limbo" situation, and therefore, he has satisfied the first standing injury.

The *second* inquiry is whether there are any prudential considerations that limit the challenges that courts are willing to hear. The rule against relying on the constitutional rights of another is not part of the constitutional requirement of standing, but is a rule of self-restraint that this Court has developed for its own governance. It is a rule of practice not to be applied where it would be difficult, if not impossible, for those persons whose rights are asserted to present their grievances to any court. *Barrows v. Jackson,* 346 U.S. 249 (1953).

Although not physically arrested, the Petitioner has suffered deprivation of a constitutionally protected liberty interest as the result of the capias without notice, and was similar to the perpetual injuries suffered by the members of the class he sought to represent who are arrested and jailed without notice and then brought before a court without the opportunity to obtain counsel and adequately protect their own interests.

As such, Petitioner has satisfied this Court's requirements as to third party standing, and there are no prudential considerations limiting Petitioner's standing. See *Singleton v. Wulff,* 428 U.S. 106, 114 (1976).

II. THE *EX PARTE* ISSUANCE OF A CAPIAS WITHOUT NOTICE CONSTITUTES A DENIAL OF DUE PROCESS.

A defendant charged with contempt has federal due process rights to be advised of the charges against him, to have a reasonable opportunity to meet the charges against him by way of defense or explanation, to have counsel and witnesses on his behalf. *In re Oliver,* 33 U.S. 257, 278 (1948), and *In re Green,* 369 U.S. 689 (1962). The procedures used by the Respondents impermissibly denied such rights to the Petitioner and his class members. Such procedures deprived defendants charged with contempt of their right to be heard and represented by counsel. *Holt v. Virginia,* 381 U.S. 131, 136 (1965). More than 120 years ago, this Court stated that:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified. *Baldwin v. Hale,* 1 Wall 223, 233 (1864).

The procedures involved in this case denied the affected individuals the right to actual notice prior to the deprivation of

their constitutionally protected liberty interests. *Mennonite Board of Missions,* ___ U.S. ___, ___, 103 S. Ct. 2706, 2712 (1983).

A basic principle of due process is that "[the] evidence used to prove the Governments case must be disclosed to the individual so that he has an opportunity to show that it was untrue." *Greene v. McElroy,* 360 U.S. 474, 496 (1959). Timely and adequate notice is required whenever an action may be challenged as a result of an incorrect or misleading factual premise, *Goldberg v. Kelly,* 397 U.S. 254, 268 (1970), which right was denied in this instance.

The fact that the prior court order stated that a capias would issue upon non-compliance did not constitute sufficient notice for the *ex parte* issuance thereof, because the filing of a vindictive affidavit is insufficient evidence of non-compliance. The filing of an affidavit for the issuance of a capias constituted the filing of a new charge that required subsequent due process safeguards. *Specht v. Patterson,* 387 U.S. 605, 610 (1967).

This Court has repeatedly held that an *ex parte* temporary deprivation of an individual's property, based solely upon a conclusionary affidavit, is a denial of due process, *Lugar v. Edmonson Oil Corp., Inc.,* 457 U.S. 922 (1982); and it must necessarily follow that the *ex parte* deprivation of a party's liberty interest, based solely upon a conclusionary affidavit, has an even higher priority of due process concern. The procedures used by the Respndents failed to afford sufficient protection against erroneous and unjust deprivations of liberty, cf. *Schall v. Martin,* ___ U.S. ___, ___, 104 S. Ct. 2403, 2415 (1984), and such procedures constituted a denial of procedural due process.

The opinions of all three state courts show that Petitioner raised his federal due process claims at all levels. Cf. *Webb v. Webb,* 451 U.S. 493 (1981). The Petitioner "specifically set up" such federal constitutional claims in the state court, and this was the purpose from the outset — to grant jurisdiction to this Court pursuant to 28 U.S.C. §1257 (3).

The state trial judge refused to interfere with the "[important] purpose behind the Domestic Relations Court capias-issurance procedure," at A18, because of a lack of compelling circumstances to so do. Therefore, the due process sufficiency was necessarily decided by the decision of the state trial court, cf. *Street v. New York,* 394 U.S. 576, 582 (1969), and this Court has a legitimate reason to review such holding, since the denial of federal

due process would constitute a compelling circumstance.

III. THE PRIVATE RESPONDENTS MUST BE CONSIDERED AS STATE ACTORS INASMUCH AS THEY CAUSED THE DEPRIVATION OF A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST PURSUANT TO AN UNCONSTITUTIONAL STATE COURT CUSTOM AND USAGE.

A private party can be considered as a state actor for purposes of the federal civil rights act when the state has "[exercised] coercive power or significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982).

In *Lugar v. Edmonson Oil Corp., Inc., supra,* it was held that a private party who causes the deprivation of an individual's property pursuant to an unconstitutional state statutory scheme was a state actor. By the same token, the *ex parte* taking of a person's liberty pursuant to an unconstitutional state court procedure should make the guilty perpetrators state actors.

The present case can be distinguished from *Dahlberg v. Becker,* 748 F. 2d 85 (C.A. 2, 1984), cert. den'd __ U.S. ___, 105 S. Ct. 1845 (1985) as therein there was only a state judge signing an order contrary to state statutory law. *Poss v. Moreland,* 324 S.E. 2d 456 (Sup. Ct. of Ga., 1985), cert. pending, can be distinguished on the same basis as that case involved contrary to state law. However, the fine distinction of *Lugar is this:*

> *A mere misuse of state statutory law by a private party does not make "state actors," but the use by private parties of unconstitutional state customs and usage that have the force of law does make them "state actors." Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 167-168 (1970).

Petitioner has satisfied the two-part test of *Lugar* used to determine if the actions of the private Respondents can be considered as "state action." Petitioner suffered a liberty deprivation caused by a state court procedure and the private parties acted together with state officials in obtaining significant aid, i.e., the issuance of the capias. The procedural custom and usage practiced by the state court is obviously state action, and the private parties joint participation therein characterizes them as "state actors."

IV. THE RESPONDENT JUDGE WHITING IS NOT PROTECTED BY JUDICIAL IMMUNITY SINCE HE ONLY HAD LIMITED JURISDICTION AND STATE STATUTORY LAW EXISTED THAT DEPRIVED HIM OF JURISDICTION.

Petitioner alleged in the state courts that Judge Whiting had no jurisdiction to order the issuance of a capias, concerning payments to be made to a Bureau of Support, since he failed to comply with the mandatory conditions precedent of the Ohio Bureau of Support statutes, Ohio Revised Code Section 2301. 34 et seq.

Counsel for Petitioner has presented the issue that the Ohio Bureau of Support statutes are mandatory and jurisdictional to the Ohio Supreme Court on three occasions, but for unknown reasons, they have accepted and then refused to decide the issue. *State, ex rel. Lesher v. Kainrad,* 65 Ohio St. 2d (1981); *Zakany v. Zakany,* 9 Ohio St. 3d 192 (1984), and the present case. (See Proposition of Law No. 1 at A19), wherein they fail to even address the issue in their opinion.

Since the Ohio Supreme Court has repeatedly failed to determine Petitioner's claim, that the provisions of the Ohio Bureau of Support statutes are mandatory and jurisdictional; that issue cannot be argued herein as it concerns interpreting state statutes.

In the 1800's, there was a clear understanding as to the distinctions defining *power* (often referred to as "authority"), *jurisdiction* and *conditions precedent* which give rise to power and jurisdiction. These three distinctions are critical in determing when jurisdiction exists, and they may often occur in combination. As this Court stated in *Voorhees v. The Bank of the United States,* (10 Peters) 35 U.S. 449 (1836)(Syllabus and pg. 474 preceding text language of the Syllabus):

> If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority. The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally

> when it is offered in evidence in an action concerning the matter adjudicated, or purporting the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper: **there can be no middle character assigned to judicial proceedings which are irreversible for error.** Such is their effect between parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution.

Emphasis was added above to highlight the feeling of the court that "[there] can be no middle character assigned to judicial proceedings which are irreversible for error." So many of the current decisions regarding jurisdiction have established a "twilight zone" wherein sanctuary is given to members of the judiciary who perform judicial acts under color of law.

The next question is: When is a judge not a judge, or when does he lose his "power" to act as a judge? For example, where a judge is charged with unprofessional conduct involving moral turpitude, and disbarment (not impeachment) proceedings are instituted against him as an attorney (not as a judge), and prior to the determination of the charges — the accused judge loses "power" to act as a judge:

> . . . we have examined a great many authorities already upon this subject, and nearly all of them hold this: That where a judge undertakes to exercise the duties of a judge clearly against a provision of a statute of the state that he shall not exercise, where by the statute of the state he has no right to exercise such duties, that his acts are entirely void. I believe the rule of common law was that those acts were not void. but voidable; but where the acts are prohibited by statute, the authorities are quite numerous that those acts are entirely void, **and that a judge who thus acts is not exempt from civil action, nor even from criminal action by reason of those acts — he has acted without authority.** (Emphasis added). *In re Dellenbaugh and Burke,* (8th Circuit Cuy. Cty., 1899) 17 Ohio C.C. 106, 113 Shepardized, the *Dellenbaugh* opinion is still the law in Cuyahoga County, Ohio.

Additionally, a judge in Ohio has no *power* to act when an affidavid of prejudice is filed, *Cuyahoga Board of Mental*

Retardation v Ass'n of Teachers, 47 Ohio App. 2d 28 (1975); nor does an administrative judge have *power* to act when the assigned judge is available or no prejudice will result from waiting for the assigned judge, *Rosenberg v. Gattarello,* 49 Ohio App. 2d 87 (1976).

There then remains that line of cases wherein jurisdiction is activated only by the occurrence of a *condition precedent.* As one would flick a light switch to turn on electricity. As an example, a married couple appears before a Domestic Relations judge who signs a Journal Entry granting them a divorce. He has the *power* and *jurisdiction,* but if a Complaint has not been filed, neither the *power* or *jurisdiction* have been activated, and the Journal Entry is void. *Spoors v. Coen* 44 Ohio St. 497 (1886). Said in a different manner:

> For example, in a divorce case in Common Pleas Court the question may be made that the plaintiff has not been a resident of the state one year before the filing of the action. The court must then decide that question first. If residence for one year has not been established, the court has no jurisdiction to hear the case. If the necessary statutory requirement as to residence is established, then the court has jurisdiction. *State, ex rel. Bechtel v. McCable,* 60 Ohio App. 233, 238 (1938).

Stating the principle, but holding that the particular facts did not come within the principle, this Court also spoke on the issue of a *condition precedent* being complied with in order to activate jurisdiction:

> The condition upon which action by the county judge could legally be had did not exist. He, therefore, never acquiired any jurisdiction, and his judgment was *coram non judice. Andes v. Ely,* 158 U.S. 312, 318 (1894).

The present case comes under the third category of cases, since Judge Whiting had to first determine if the *condition precedent* — the compliance with the mandatory provisions of the Ohio Bureau of Support statutes — was satisfied.

In *Stump v. Sparkman,* 435 U.S. 349 (1978), this Court did not clarify the three distinctions set forth above — which distinctions warrant clarification.

V. THE PETITIONER IS NOT BARRED FROM HAVING HIS FEDERAL CLAIMS REVIEWED BY THIS COURT.

A. THERE IS NO ADEQUATE STATE GROUND INVOLVED WHICH WOULD DEPRIVE THIS COURT OF JURISDICTION.

As previously stated on page 4, supra, the Ohio Supreme Court failed to determine the Petitioner's standing on the basis that he failed to assign as error in the Court of Appeals the trial court's failure to certify the case as a class action. However, the Petitioner raised the standing issue at every stage of the state court proceedings, and both the trial court and the Court of Appeals specifically decided the issue. See A12 and A10-A17. As such, any alleged procedural defaults committed in the state courts would not serve a state interest that would justify this Court in not determining his federal constitutional claims. *Henry v. Mississippi,* 379 U.S. 443 (1965).

The actions of the Ohio Supreme Court herein improperly put form over substance and cannot prevent review in this Court. *James v. Kentucky,* ___ U.S. ___, ___, 104 S. Ct. 1830, 1835 (1984).

B. THE ACTIONS OF THE OHIO SUPREME COURT DENIED FEDERAL CONSTITUTIONAL RIGHTS TO THE PETITIONER.

A comparison of the Propositions of Law contained in Petitioner's Brief to the Ohio Supreme Court (A19) with that court's opinion discloses that his federal constitutional claims were never considered by that court.

Petitioner's Motion For Rehearing contained the following language:

> This Court's misstatements of the record, the failure to follow its own precedents without justification or explanation, as well as the failure to follow standards established by the Supreme Court of the United States, and the failure to address properly presented issues, constitutes a denial of the appellant's constitutional right to Due Process.
>
> The right of access to the courts is an aspect of the *First Amendment* right to petition the government for redress of grievances. See *California Motor Transportation Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972), and *Bill Johnson's Restaurants Inc. v. N.L.R.B.,* ___ U.S. ___, ___, 103 S. Ct. 2161, 2169 (1983).
>
> The actions of this Court have effectively prevented the

appellant from access to the courts of this state and constitute a denial of Due Process in violation of the *Fourteenth Amendment* to the United States Constitution. See *Boddie v. Connecticut,* 401 U.S. 371 (1971).

The actions of the Ohio Supreme Court denied Petitioner a real opportunity to have his causes of action, which constitute a property interest protected by the Due Process Clause, see *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982), properly determined.

This Court has recently held that when a state opts to act in a field where its action has significant discretionary elements (such as where it establishes a system of appeals), though not required to do so, it must nevertheless act in accord with the dictates of the Due Process Clause of the *Fourteenth Amendment. Evitts v. Lucey,* ___ U.S. ___, 105 S. Ct. 830, 839 (1985).

C. THIS COURT SHOULD NOT DENY REVIEW DUE TO THE PRESENT CHANGE BY THE RESPONDENTS IN THE PROCEDURES NOW USED BY THEM IN THE ISSUANCE OF CAPIASES.

The Cuyahoga County Court of Common Pleas, Division of Domestic Relations, has significantly changed its procedures in the issurance of capiases since the filing of Petitioner's Complaint. However, such change of procedure should not prevent this Court from reviewing the decision of the Ohio Supreme Court.

That is true because the failure of this Court to review the state court judgment would leave the Respondents free to return to their old ways. *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953). The Respondents have never said that they will continue their present procedures even if the judgment of the Ohio Supreme Court is reversed. Cf. *Quinn v. Muscare,* 425 U.S. 560, 563 (1976).

Additionally, a decision on the constitutionality of the prior procedures is necessary for a determination of his claims for monetary relief; and a decision on Petitioner's federal constitutional claims will have direct consequences to Petitioner's substantive rights to justify review of this Court. Cf. *Board of License Commissioners of the Town of Tiverton v. Pastore,* ___ U.S. ___, ___, 105 S. Ct. 685, 686 (1985).

D. THE STATE TRIAL COURT MADE FACTUAL

CONCLUSIONS WITHOUT TESTIMONY OR OTHER EVIDENTIARY MATTER, AND ANY SUCH CONCLUSIONS CANNOT BE USED TO DENY REVIEW BY THIS COURT.

The state trial court held that Petitioner was in violation of the previous court order when the affidavit for a capias was filed. Such unfounded conclusion was then adopted by the state Court of Appeals and Ohio Supreme Court as being factual. However, no testimony was taken by the state trial court, nor was any other evidentiary matter presented that showed that he was in violation of the court order. In fact, the only evidence presented were exhibits attached to the Petitioner's Brief which showed that he was not in violation of the court order.

In *Fiske v. Kansas,* 274 U.S. 380, 385-386 (1927), this Court stated that it "[will] review the finding of facts by a State court where a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it," which is the exact situation in this case.

The state trial court made factual assumptions which were inconsistent with the allegations contained in Petitioner's Complaint and were not based upon any evidence before him, and which were inappropriate at that stage of the litigation, which was only a hearing on a Motion For A Preliminary Injunction. *Cleveland Board of Education v. Loudermill,* 470 U.S. ___, ___, n.5, 105 S. Ct. 1487, 1492, n.5 (1985). As such there was insufficient evidence presented to the state trial court to warrant a finding that no material question of fact existed, and that the Respondents were entitled to judgments in their favor as a matter of law.

CONCLUSION

The present case presents this Court with an opportunity to bring clarity to four important federal issues (1) Third party standing; (2) The *ex parte* deprivation of a liberty interest; (3) State action of private parties who cause such liberty deprivations pursuant to unconsititutional state court custom and usage, and (4) Judicial immunity clarification.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

SANFORD J. BERGER
Counsel of Record
ROBERT M. FERTEL
BERGER AND FERTEL
1836 Euclid Avenue, Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950
Attorneys for Petitioner,
Norman Kelly

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO
(Dated May 15, 1985)
NO. 83-1482
THE SUPREME COURT OF OHIO
The State of Ohio, City of Columbus

KELLY
Appellant
vs.
WHITING, JUDGE, ET AL.
Appellees

Appeal from the Court of Appeals
for Cuyahoga County

Plaintiff-appellant, Norman Kelly, commenced this action by filing a complaint in the Court of Common Pleas of Cuyahoga County seeking money damages and declaratory and injunction relief against the following defendants: Judge Herbert R. Whiting, Judge James D. Sweeney, Referee Ramon Basie, Michael O'Grady, Director of the Bureau of Support, Gerald Fuerst, Clerk of Courts, and Attorney General William J. Brown (hereinafter referred to as "governmental appellees"). Other defendants were Margo K. Kelly, appellant's ex-wife, Mildred Schad, the ex-wife's attorney, and Radman Schad & Ginsberg Co. the law firm by which Schad is employed (hereinafter referred to as "non-governmental defendants").

On April 20, 1981, Judge Whiting approved the report of Referee Basie which ordered appellant to pay to his ex-wife, Margo Kelly, child support, attorney fees, and compensation for the children's medical and dental expenses. The court's journal entry specifically provided that in the event appellant did not comply with the order, a capias would issue requiring him to appear in court to show cause why he should not be punished for contempt.

On June 3, 1981, Margo Kelly filed an affidavit with the Domestic Relations Division of the Court of Common Pleas of Cuyahoga County detailing appellant's non-compliance with the order. Judge Whiting signed an order on June 19, 1981 causing a capias to be issued for appellant. Shortly thereafter, appellant represented to the court that he would make a voluntary

appearance. Thereafter, Judge Whiting issued an order staying the execution of the capias. Subsequently, the capias was dismissed at the request of Mildred Schad. Appellant was never arrested pursuant to the capias or otherwise.

On May 28, 1982, appellant commenced the instant action which arose out of the issuance of the capias by Judge Whiting due to appellant's alleged failure to obey a support order. The basis for his various claims is an allegation that Margo Kelly's affidavit contained a "false representation" with respect to the amount of attorney fees he owed her. Appellant set forth causes of action against all appellees sounding in malicious prosecution and a violation of his civil rights under Section 1983, Title 42, U.S. Code. In addition, appellant set forth a cause of action alleging an invasion of his privacy by the non-governmental appellees. Appellant also sought injunctive relief restraining Judge Whiting from issuing a further capias and for a declaratory judgment holding both the capias procedure and R.C. 2705.03 unconstitutional.

The governmental appellees filed a motion for summary judgment and the non-governmental appellees filed a motion to dismiss. A hearing was held, after which the trial court granted appellees' motions.

In his written opinion, the trial court granted summary judgment in favor of the governmental appellees on three grounds: (1) judicial immunity, (2) lack of standing, and (3) failure to state a claim to invoke the equity jurisdiction of the court. The non-governmental appellees' motion to dismiss was granted on the bases of collateral estoppel and lack of standing. Appellant appealed to the Court of Appeals for Cuyahoga County which affirmed the trial court.

Prior to the trial court hearing of this case, appellant initiated suit in the United States District Court for the Northern District of Ohio, Eastern Division, involving the same issues as this case. The federal court also dismissed appellant's claims.

This case is before this court upon the allowance of a motion to certify the record.

Sanford J. Berger and Robert M. Fertel, for appellant.

John T. Corrigan, prosecuting attorney, Michael D. Pokorny, and Thomas P. Gill, for governmental appellees.

Radman, Schad & Ginsberg Co., L.P.A., and Mildred K. Schad, for non-governmental appellees.

WRIGHT, J. Initially, it should be noted that the only issues properly before this court are the following: (1) Whether the governmental defendants are protected from civil liability by the doctrine of judicial immunity? (2) Has the appellant set forth causes of action against the non-governmental defendants based on the common-law torts of invasion of privacy or malicious prosecution, or based on Section 1983, Title 42, U.S. Code?[1]

Appellant's Section 1983 claims against the governmental appellees were properly dismissed because these appellees were immune from the claims. *Stump v. Sparkman*, (1978), 435 U.S. 349, held the following with regard to the scope of a judge's immunity from damages liability when sued pursuant to Section 1983, Title 42, U.S. Code:

"*** A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' "**Id.** at 356-357 (Citation and footnotes omitted.)

The trial court had jurisdiction to issue a capias. R.C. 2705.02, 2705.03 and 3105.011; *Smith v. Smith* (1980), 70 Ohio App. 2d 87, 91 (24 0.0.3d 155).[2] Therefore, Judges Sweeney and Whiting are immune from liability with respect to appellant's Section 1983 claims. The Section 1983 claims against the remaining governmental appellees were properly dismissed because, with the exception of Gerald Fuerst, Clerk of Courts, the record does not disclose that they were involved with the issuance of the capias. Gerald Fuerst, Clerk of Courts, is immune from liability under Section 1983 because he was merely acting pursuant to court directive. *Lockhart v. Hoenstine*, (C.A. 3, 1969), 411 F.2d 455, Certiorari denied (1969), 396 U.S. 941.

Appellant's Section 1983 claims against the non-governmental appellees must fail for lack of state action. This same issue was presented in appellant's suit in federal district court. We adhere to that court's reasoning that appellant's ex-wife was not a state actor on the authority of *Torok v. Torok* (Oct. 31, 1983), N.D. Ohio No. 83-4432, unreported, and that the ex-wife's attorneys were not subject to Section 1983 because "a privately retained attorney does not act under color of state law while representing his client in the state court system." See *Henderson v. Fisher* (C.A. 3, 1980), 631 F.2d 1115, 1119 *Dunn v. Hackworth*, (C.A. 8, 1980), 628 F.2d 1111, 1112.

Appellant's common-law tort actions against the governmental appellees were properly dismissed because of judicial immunity. It is well-settled that a judge is immune from civil liability for actions taken in his judicial capacity when jurisdiction is proper. *Wilson v. Neu* (1984), 12 Ohio St. 3d 102; *Voll v. Steel* (1943), 141 Ohio St. 293 (25 O.O. 424); *Tymcio v. State* (1977) 52 Ohio App. 2d 298 (t O.O. 3d 310). Likewise, the remaining governmental appellees also enjoy a similar immunity. See *Wholesale Electric & Supply v. Robusky* (1970), 22 Ohio St. 2d 181 (51 O.O. 2d 240); *Mennel Milling Co. v. Slosser* (1942), 140 Ohio St. 445 (24 O.O. 466).

Appellant asserts a cause of action based on malicious prosecution against the non-governmental appellees. This claim was dismissed by the trial court on the bases of collateral estoppel and lack of standing. The court of appeals affirmed the dismissal of this claim on the bases of lack of standing and failure to set forth a claim for which relief may be granted. Putting aside the issue of the appellant's lack of standing, we affirm the lower court's dismissal of this cause of action for failure to set forth a claim for which relief may be granted.

In order to withstand a motion to dismiss for failure to state a claim upon which relief may be granted, a complaint for malicious prosecution must allege the following: (1) a prior proceeding was maliciously instituted against the plaintiff by defendant. *Woodruff v. Paschen* (1922), 105 Ohio St. 396; (2) there was no probable cause for the filing of the prior lawsuit, *Melanowski v. Judy* (1921), 102 Ohio St. 153, and (3) the prior lawsuit was terminated in the plaintiff's favor, *Levering v. National Bank* (1912) 87 Ohio St. 117. Applying this standard, appellant's malicious prosecution action can not withstand a motion to dismiss. Although no hearing on the capias was held, appellant, after the filing of the affidavit that triggered the issuance of the capias, voluntarily complied with the original court order. Therefore, the third requirement above has not been met. Further, appellant fails to state a claim for relief because he was not arrested and his property was not seized. See *Cincinnati Daily Tribune Co. v. Bruck* (1900), 61 Ohio St. 489; *Dakters v. Shane* (1978), 64 Ohio App. 2d 196 (18 O.O. 3d 150); *Battig v. Forshey* (1982), 7 Ohio App. 3d 72 *Woyczynski v. Wolf* (1983), 11 Ohio App. 3d 226. Therefore, appellant's malicious prosecution action was properly dismissed.

Appellant also attempted to state a claim for invasion of privacy. The record discloses that appellant was in violation of a court order. The filing of a complaint by Margo Kelly to bring this violation to the court's attention obviously does not constitute tortious conduct.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., SWEENEY, LOCHER, HOLMES, C. BROWN and DOUGLAS, JJ., concur.

---

1. Appellant's claim that he is entitled to maintain a class action will not be considered by this court because this claim was not assigned as error in the court of appeals. Appellant's claim that he has standing to maintain a suit seeking injunctive or declaratory relief will not be considered by this court because appellant discussed his standing only in the context of maintaining a class action suit and, as noted earlier, this court does not have jurisdiction to entertain appellant's class action arguments. Further, even if appellant's standing arguments were properly before this court, appellant would not prevail because the fact that he was never arrested and the capias was withdrawn illustrate that he was not in danger of suffering irreparable harm, as required for injunctive relief, and that he was not in immediate danger of suffering direct injury as required for declaratory relief.

R.C. 2705.02 states in pertinent part:

> "A person guilty of any of the following acts may be punished as for a contempt:
>
> "(A) *Disobedience of,* or resistance to, a lawful writ, process, *order* rule, judgment or command *of a court* or an officer;***." (Emphasis added)

R. C. 2705.03 states:

> "In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of court, an entry thereof made upon the journal and an opportunity given to the accused to be heard, by himself or counsel. This section *does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.*" (Emphasis added)

R. C. 3105.011 states:

> "The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters. This section is not a determination by the general assembly that such equitable powers and jurisdiction do not exist with respect to any such matter."

SUPPLEMENTAL OPINION OF THE CHIEF JUSTICE OF THE SUPREME COURT OF OHIO

(Reported July 1, 1985)

NO. 83-1482

KELLY
Appellant
vs.
WHITING, JUDGE, ET AL.
Appellees

CELEBREEZE, C. J., concurring. I write additionally concerning the majority's discussion of the elements of the tort of malicious prosecution.

Recently, this court set forth in succinct clarity the three necessary elements of malicious prosecution in the *per curiam* opinion of *Border City S.&L. Assn. v. Moan* (1984) 15 Ohio St. 3d 65. We observed that in order to prove the tort of malicious prosecution, "[it] will be incumbent upon appellant to establish that these lawsuits were instituted maliciously, without probable cause, and as a general rule, were terminated in appellant's favor." *Id.* at 66.

In the cause *sub judice,* the opinion correctly sets forth these three basic components. However, the majority then appears to implicitly adopt an additional element that a plaintiff demonstrate a seizure of his or her person or property during the course of the prior proceedings.

While some courts have adopted such a fourth element, see dissent in *Border City,* supra, at 67, in my opinion the seizure of property or person merely concerns the extent of the plaintiff's damage, and its absence is not a bar to bringing an action. A contrary analysis could leave severely injured parties without a remedy and may in fact encourage tortfeasors to file malicious litigation knowing they are safe from recourse so long as they do not seize property or have their victims arrested.

I feel certain such is not the message this court intends to convey. I, therefore, concur based on the reasoning set forth by the majority in *Border City,* supra.

THE SUPREME COURT OF OHIO
Columbus

Norman Kelly et al.,	:	1985 TERM
Appellants	:	To wit: May 15, 1985
v.	:	Case No. 83-1482
Herbert R. Whiting, Judge et al.	:	JUDGMENT ENTRY
Appellees	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons stated in the opinion filed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution.

s/s Frank D. Celebreeze

FRANK D. CELEBREZZE
Chief Justice

I, James W. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, the Journal of this Court.

JAMES Wm. KELLY CLERK

THE SUPREME COURT OF OHIO
Columbus

Norman Kelly et al.,	:	1985 TERM
	:	To wit: June 19, 1985
Appellants	:	
v.	:	Case No. 83-1482
Herbert R. Whiting, Judge	:	REHEARING ENTRY
et al.	:	
Appellees	:	

It is ordered by the Court that rehearing in this case be, and the same is hereby denied.

s/s Frank D. Celebreeze

FRANK D. CELEBREZZE
Chief Justice

I, James W. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, the Journal of this Court.
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 19th day of June, 1985.

JAMES Wm. KELLY CLERK

Sam F. Adkins, Deputy

JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY, OHIO
No. 45760
(Dated July 21, 1983)
COURT OF APPEALS OF OHIO
Eighth Appellate District
Cuyahoga

NORMAN KELLY
Plaintiff-Appellant
-vs-
THE HON. HERBERT R. WHITING, ET AL.
Defendants-Appellees

PATTON, C. J.: Plaintiff-appellant, Norman Kelly, commenced this action by filing a complaint in the Cuyahoga County Court of Common Pleas, seeking money damages, and declaratory and injunctive relief, against the following defendants: Judge Whiting, Administrative Judge Sweeney, Referee Ramon Basie (all of the Domestic Relations Division), Michael O'Grady, Director of the Bureau of Support, Gerald Fuerst, Clerk of Courts, Attorney General William Brown[1] (hereinafter referred to as "governmental defendants"), Margo Kelly, appellant's ex-wife's attorney, and Radinan, Schad & Ginsberg Co., L.P.A., the law firm by which Mildred Schad is employed (hereinafter referred to as "non-governmental defendants").

This action arose out of the issuance of a capias by the Domestic Relations Court due to appellant's failure to obey a support order.

On April 20, 1981, Judge Whiting approved the report of Referee Basie which ordered appellant to pay his ex-wife, Margo Kelly, child support in the amount of $40 per week per child, $120 for their children's medical bills, $700 in attorney fees, and further to pay or make arrangements to pay for orthodontic treatment for the children. The court's journal entry specifically provided that in the event appellant did not comply with the order, a capias would issue requiring him to appear in court to show cause why he should not be punished for contempt.

On June 3, 1981, Margo Kelly filed an affidavit with the Domestic Relations Division detailing appellant's noncompliance with the order. Judge Whiting signed an order on June 19, 1981

causing a capias to be issued for appellant. Shortly thereafter, appellant represented to the court that he would make a voluntary appearance, and as a result, Judge Whiting issued an order staying the execution of the capias. Subsequently, on August 17, 1981, the capias was dismissed at the request of Mildred Schad. Appellant was never arrested.

On May 26, 1982, appellant commenced the instant action. The basis for his various claims is an allegation that Margo Kelly's affidavit contained a "false representation" with respect to the amount of attorney fees he owed to her. As against all defendants, appellant set forth causes of action in abuse of process, malicious prosecution, negligence and a violation of his federal civil rights under 42 U.S.C. §1983. In addition thereto, appellant alleged an invasion of his privacy against the nongovernmental defendants. Appellant also sought injunction relief restraining Judge Whiting from further issuing capiases, and a declaratory judgment holding both the capias procedure and R.C. 2705.03 unconstitutional.

The governmental defendants filed a motion for summary judgment and the nongovernmental defendants filed a motion to dismiss. A hearing was held, after which the trial court granted defendants' motions.

In its written opinion, the trial court granted summary judgment in favor of the governmental defendants on three grounds: (1) judicial immunity (2) lack of standing, and (3) failure to state a claim to invoke the equity jurisdiction of the court. The nongovernmental defendants' motion to dismiss was granted on the grounds of collateral estoppel and lack of standing.

Appellant has appealed, and he assigns two errors for this court's review.

I

PLAINTIFF'S COMPLAINT ALLEGED FACTS TO THE EFFECT THAT THE GOVERNMENTAL DEFENDANTS HAD COMMITTED ACTS IN VIOLATION OF THE COMMON, STATUTORY AND CASE LAW OF THE STATE OF OHIO, THE STATUTORY LAW OF THE UNITED STATES, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ALL OF WHICH ENTITLED HIM TO DECLARATORY, INJUNCTIVE AND MONETARY RELIEF, AND THE TRIAL

COURT ERRED IN SUSTAINING THE GOVERNMENTAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DENYING ALL THE RELIEF PRAYED FOR.

Appellant argues that the trial court erred in granting summary judgment in favor of the governmental defendants. This argument is without merit.

The gravamen of appellant's various claims made against these defendants is that each failed to investigate properly the charges made against him in the affidavit, and that each was without the jurisdiction or legal authority to cause the capias to issue.

The case of *Stump v. Sparkman* (1978), 435 U.S. 349, involved the scope of a judge's immunity from damages liability when sued under 42 U.S.C. §1983.[3] The Supreme Court held therein that:

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' *Id.* at 356-357 (citation and footnote omitted).

Contrary to appellant's contention, the trial court clearly had the jurisdiction to issue a capias in furtherance of its contempt power to compel compliance with its prior order. R.C. 2905.02 and 2705.03[3]; *Smith v. Smith* (1980), 70 Ohio App. 2d 87, 91. Judges Sweeney and Whiting are therefore immune from liability with respect to appellant's §1983 claim.

We observe that the record discloses no involvement by Referee Basie, Michael O'Grady, Director of the Bureau of Support, or Administrative Judge Sweeney with the issuance of the capias. The attorney fees were not ordered to be paid through the Bureau of Support. Even if some involvement were shown, however, they, together with Gerald Fuerst, Clerk of Courts, are also immune from liability under §1983. *Littleton v. Fisher* (6th Cir. 1976), 530 F. 2d 691; *Lockhart v. Hoenstine* (3rd Cir. 1969), 411 F. 2d 455, *cert den.* 396 U.S. 941.

With respect to appellant's common law tort actions, it is well settled that a judge is exempt from civil liability for actions taken in his judicial capacity. *Voll v. Steele* (1943), 141 Ohio St. 293; *Tymcio v. State* (1977), 52 Ohio App. 2d 298. The remaining

governmental defendants also enjoy a similar immunity. See *Wholesale Electric & Supply v. Robusky* (1970), 22 Ohio St. 2d 181. Therefore appellant's common law tort actions must also fail.

Appellant also sought a declaration in the court below that both the capias procedure and R.C. 2705.03 are unconstitutional.[4] The trial court found that appellant lacked the standing necessary to entitle him to such declaratory relief. We agree.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin* (1975), 422 U.S. 490, 498. Before one can argue the unconstitutionality of a provision of law, he must come within its purview and have a direct interest of such a nature that his right will be adversely affected by its enforcement. *Anderson v. Brown, Mayor* (1968), 13 Ohio St. 2d 53; *Joseph Brothers Co. v. Brown* (1974), 65 Ohio App. 2d 43, 46. In *O'Shea v. Littleton* (1974), 414 U.S. 488, 494, the Supreme Court stated that:

> It must be alleged that the plaintiff 'has sustained or is in immediate danger of sustaining some direct injury' as the result of the challenged statute or official conduct. The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' (Citations omitteed)

In the instant case, appellant was never arrested. Indeed, the capias was dismissed at the request of one of the defendants over nine months before appellant filed this action. Thus, appellant's alleged injury or threat of injury was not "real and immediate" rather, it was purely "conjectural." For this reason, therefore, the trial court did not err in concluding that appellant lacked standing to challenge the constitutionality of the capias procedure or R.C. 2705.03.

Appellant also sought injunctive relief to prevent Judge Whiting from further issuing capiases. Before a party is entitled to injunctive relief, he must establish that he has or will suffer irreparable harm for which there is no adequate remedy at law. See *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St. 2d 51, 56. Appellant did not satisfy this standard, either in the allegations of his pleadings or in his argument presented at the hearing. He was never arrested nor was he under the threat of arrest when he filed this action. In addition, the trial

court found appellant to be in "apparent violation" of a court order, and concluded that he was not seeking equitable relief with clean hands. The record supports this conclusion. Therefore, the trial court did not abuse its discretion in denying appellant injunctive relief.

For these reasons, this assignment of error is not well taken.

II

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS OF THE DEFENDANTS, MARGO KELLY, MILDRED SCHAD AND RADMAN, SCHAD AND GINSBERG ON THE BASIS OF COLLATERAL ESTOPPEL AND LACK OF STANDING.

Appellant argues that the trial court erred in granting the nongovernmental defendants' motion to dismiss. We disagree.

The trial court granted defendants' motion on the grounds of collateral estoppel and lack of standing. The doctrine of collateral estoppel, which seeks to preclude the relitigation, in a second action, of an issue that has been actually or necessarily litigated and determined in a prior action. *Whithead v. Genl. Tire Co.* (1969), 20 Ohio St. 2d 108, is not applicable to the present case, because appellant, by filing this action, did not seek to challenge the propriety of the original support order. We shall construe defendant's lack of standing argument as one which challenges whether appellant has set forth any claim for which relief may be granted. We find he has not.

Appellant has not set forth a cause of action under §1983 against these defendants. First, where a state does no more than furnish a neutral forum for the resolution of issues and has no interest in the outcome of the lawsuit, the state court's action in issuing an order cannot be imputed to a private party, here Margo Kelly, seeking issuance of the order. *Norton v. Liddel* (10th Cir. 1980), 620 F. 2d 1375, 1380. Further, appellant did not allege in his complaint that Margo Kelly was a wilful participant in joint activity with the state or its agents, here the court officers, in causing the capias to issue. See *Stern v. Sommerville Communications Corp.* (E.D. Mich. 1981), 529 F. Supp. 29. Second, in their capacities as representatives of a client in court, private counsel do not act under color of state law, and therefore counsel's actions cannot form the basis of a §1983 claim. *McCord v. Bailey* (D.C. Cir. 1980), 636 F. 2d 606, 613, cert. den 451 U.S. 983; *Dunn v.*

Hackworth (8th Cir. 1980), 628 F. 2d 1111, 1112.

In his complaint appellant alleged both abuse of process and malicious prosecution. It is clear from his allegations, however, that appellant's cause of action sounds only in malicious prosecution, as he alleged that the defendants filed false charges against him "maliciously and without probable cause." See *Avco Delta Corp. v. Walker* (1969), 22 Ohio App. 2d 61. It is well settled in Ohio that a complaint asserting a cause of action for malicious prosecution must allege an arrest of the person or a seizure of property and absent such an allegation, the complaint warrants dismissal. *Gillinov v. Miller* Ct. App. Cuy. Cty., Sept. 25, 1980), unreported No. 41729; *Perry v. Arsham* (1956), 101 Ohio App. 285. No such allegation was made by appellant in the instant case.

In addition, an attorney who acts with the authority of his client is not liable to a third party in an action for malicious prosecution. *W. D. G., Inc. v. Mutual Manufacturing & Supply Co.* (1976), 5 Ohio Op. 3d 397. Accordingly, the trial court did not err in dismissing this cause of action.

Appellant also failed to state a cause of action in negligence or invasion of privacy. It appears from the record that appellant was in violation of a court order, and the filing of an affidavit by Margo Kelly, in order to bring this to the court's attention, was entirely proper, and did not constitute tortious conduct on her part. It is true that the court's order required appellant to pay $700 in attorney fees, and that the affidavit stated that he owed $750. However, the court order clearly reflects the correct amount, and appellant did not allege that he was caused by her affidavit to pay anything more than this.

Further, as concerns Mildred Schad and her law firm, we note that as a general rule, an attorney is immune from liability to third persons arising from the performance of the attorney's professional activities undertaken on behalf of the attorney's client. *National Savings Bank v. Ward* (1879), 100 U.S. 195; W.D.G., Inc. v. Mutual Manufacturing & Supply Co., supra; *Saby v. Thompson, Hine & Flory, et al.* (Ct. App. Cuy. Cty., May 17, 1979), unreported No. 38774.

For these reasons, this assignment of error is not well taken.

Accordingly, the judgment of the trial court is affirmed.

It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court find there were reasonable grounds for this appeal.
It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

NAHRA, J., CONCURS

DAY, J., CONCURS IN JUDGMENT ONLY

s/s John T. Patton

RECEIVED FOR FILING
Oct. 21, 1983
GERALD E. FUERST, CLERK

---

1. William Brown was named as a defendant in the complaint pursuant to R.C. 2721.12. He has made no appearance in this action.

2. This federal statute reads:

> Every person who, under color of any statute, ordinance regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Revised Code 2705.02 states in pertinent part:

> A person guilty of any of the following acts may be punished as for contempt:
> (A) *Disobedience of*, or resistanced to, a lawful writ, process, *order*, rule, judgment or command *of a court* or an officer;*** (Emphasis added).

4. Revised Code 2705.03 states:

> In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section *does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.* (Emphasis added.)

OPINION AND ORDER OF THE
COURT OF COMMON PLEAS
CUYAHOGA COUNTY
CASE NO. 45853
(Dated July 22, 1982)

NORMAN KELLY
Plaintiff

-vs-

THE HON. HERBERT R. WHITING, ET AL.
Defendants

OPINION AND ORDER

BERNARD FRIEDMAN, J: This case came before the court on a summary judgment Motion on behalf of the various governmental defendants and on a Motion To Dismiss filed by the remaining defendants. To better understand the matters raised in these motions, the court conducted a hearing on Friday, July 16, 1982. For the reasons that follow, both the defendants' motion are granted.

This case stems from a divorce action involving plaintiff and his wife, *Kelly v. Kelly*, D-94883. By journal entry posted January 9, 1979 plaintiff and his wife were granted a divorce by the Domestic Relations Court. Numerous post-judgment motions followed. One of these resulted in an order (journalized on April 20, 1981) ordering the plaintiff to pay certain medical and attorney bills and to provide child support payments (Exhibit "A" to Government Defendants' Motion). A hearing was held prior to issuing this order on January 6 and 14, 1981, at which plaintiff was present. He therefore had actual notice of the contents of the order, which order stood without appeal. The order further provided that should plaintiff fail to obey the terms of the judgment within one year, a capias shall issue against him on the basis of an affidavit. O.R.C. §2319.03 permits the use of affidavits to obtain certain provisional remedies. The affidavit issued by Margo Kelly, of disputed veracity, nevertheless fulfilled the statutory requirements and caused a capias to be issued, although no actual arrest was made of plaintiff. In the present action he advances numerous theories as he seeks a variety of remedies including injunctive relief, declaratory judgment, and money damages.

The governmental defendants here named — The Honorable Herbert R. Whiting of the Domestic Relations Division of Common Pleas Court; The Honorable James D. Sweeney, also on the Domestic Relations bench; Ramon Basie, Common Pleas Court Referee; Michael O'Grady, Director of the Bureau of Support; and Gerald E. Fuerst, Clerk of Common Pleas Court — are all clearly blanketed by the doctrine of judicial immunity as a matter of law. These officials were performing duties normally performed by judges or agents of the court in the normal course of their routine tasks. See *Stump v. Sparkman*, 435 U.S. 349 (1978). The validity of plaintiff's allegations aside, Judges Whiting and Sweeney had subject matter jurisdiction, and "neither the procedural errors [they] may have committed nor the lack of a specific statute authorizing this approval of the petition in question rendered him liable in damages for the consequences of his actions." *Stump*, 435 U.S. 359. The doctrine extends to Referee Basie under *Mennel Mining Co. vs. Slusser*, 140 Ohio St. 445 (1942). Similarly, under the applicable statutes, the Bureau of Support and Clerk of Courts act in a quasi-judicial capacity in carrying out the functions of the Court here and Mr. O'Grady and Mr. Fuerst are similarly shielded from an action for damages. See, e.g. *Lockhart vs. Hoenstine*, 411 F 2d 455, 459-60 (3rd Cir. 1969); *Haldane vs. Chagnon*, 345 F. 2d 601 (9th Cir. 1965).

Secondly, we rule that plaintiff — never having been in fact subject to bodily restraint — cannot therefore be said to have standing that would allow him to raise the issue of the constitutionality of the capias procedure used by the Domestic Relations Court. *Simon vs. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). Thus plaintiff's claim for injunctive relief on constitutional grounds. (Fourteenth Amendment of U.S. Constitution and Sec. 2705.03 of the Ohio Revised Code).

The claim for injunctive relief must also fail on its face, additionally. An injunction is an extraordinary remedy at equity that demands an affirmative response to each prong of a three-part examination: (1) Was there irreparable harm done?; (2) Is there a lack of an adequate remedy at law available to plaintiff?; and (3) Does the plaintiff come before the Court with "clean hands" himself? On not one of these inquiries can plaintiff be said to prevail. Plaintiff was never arrested and is currently under no risk of being arrested; he could have chosen the remedy available to him at law if he were challenging the underlying

validity of the Court's order — i.e., he could have perfected an appeal; and finally, the fact that he was — and still is — in apparent violation of the court order renders him "tainted" in appearance before this court. It should also be noted that the Court recognizes the important purposes behind the Domestic Relations Court capias-issuance procedure here under attack, and the presence of compelling circumstances would have to be present for it to interfer (sic.) with such procedure, which circumstances are certainly not present in the instant case, *cf., Ashwander vs. Tennessee Valley Authority,* 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

Finally, as to defendants Margo Kelly, Mildred K. Schad, and Radman, Schad and Ginsberg & Co., L.P.A., the allegations directed at them by plaintiff are equally deficient on grounds of lack of standing and the defense of collateral estoppel.

Accordingly, judgment is entered for the Defendants and against the Plaintiff, Norman Kelly, at Plaintiff's costs.

IT IS SO ORDERED.

s/s Bernard Friedman

JUDGE BERNARD FRIEDMAN

Dated July 22, 1982

PROPOSITIONS OF LAW PRESENTED TO
THE SUPREME COURT OF OHIO
No. 83-1482
(Filed on September 10, 1984)

Proposition of Law No. 1

WHEN CLEARLY ESTABLISHED STATUTORY AND CASE LAW EXISTS, SETTING FORTH A MANDATORY PROCEDURAL SCHEME, NO PUBLIC SERVANT, ELECTED OR APPOINTED, CAN VIOLATE THE MANDATORY PROVISIONS THEREOF, AND THEN SEEK IMMUNITY WHEN THE AGGRIEVED PARTY WHOSE CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED SEEKS REDRESS.

Proposition of Law No. 2

A LITIGANT STATES A VALID CAUSE OF ACTION UNDER *U.S.C. SEC. 1983* WHEN HIS COMPLAINT ALLEGES FACTS CLAIMING THAT THE DEFENDANTS, BOTH GOVERNMENTAL AND NONGOVERNMENTAL, ACTED IN CONCERT PURSUANT TO UNCONSTITUTIONAL COURT PROCEDURES, THAT DEPRIVED HIM OF HIS CONSTITUTIONALLY PROTECTED LIBERTY INTEREST.

Proposition of Law No. 3

DUE TO THE INHERENTLY OPPRESSIVE NATURE OF POST DIVORCE CONTEMPT PROCEEDINGS, THAT CAN REPEATEDLY BE INSTITUTED BY A VINDICTIVE PRIVATE PARTY AND A MERCENARY ATTORNEY, THERE IS A HEIGHTENED THREAT TO FUNDAMENTAL LIBERTY INTERESTS, NECESSITATING THE NEED FOR ATTORNEYS AND THEIR CLIENTS TO BE HELD ACCOUNTABLE FOR ABUSING CIVIL PROCESS IN A MANNER THAT IS CALCULATED TO VIOLATE CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS.

Proposition of Law No. 4

THE COURT PROCEDURES OF PERMITTING A PRIVATE PARTY TO OBTAIN A *CAPIAS* MERELY UPON THE PRESENTATION OF A SWORN AFFIDAVIT THAT A SUBJECTIVE CONTEMPT OF COURT HAS OCCURRED, WITHOUT ANY PROVISION FOR NOTICE OR A PREDEPRIVATION HEARING BEING PROVIDED TO THE ALLEGED CONTEMNOR PRIOR TO HIS ARREST, VIOLATES THE DUE PROCESS CLAUSE OF THE *FOURTEENTH AMEND-*

MENT TO THE CONSTITUTION OF THE UNITED STATES.

Proposition of Law No. 5

AN INJURED LITIGANT HAS STANDING TO MAINTAIN A CLASS ACTION SUIT ON BEHALF OF HIMSELF AND OTHER SIMILARLY SITUATED INDIVIDUALS WHO CANNOT ADEQUATELY PROTECT THEIR INTERESTS, WHEN HE ATTACKS COURT PRACTICES AND PROCEDURES WHICH HAVE INJURED HIM AND ARE CALCULATED TO INJURE AND DEPRIVE THE MEMBERS OF THE CLASS HE SEEKS TO REPRESENT OF THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS-ESPECIALLY WHEN THE COMPLAINED OF PRACTICES AND PROCEDURES ARE CAPABLE OF REPETITION WITHOUT IMMEDIATE RELIEF.

CONSTITUTION OF THE UNITED STATES

ARTICLE III, Section 2:

The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.